Supreme Court, U.S.
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No. 01-1307

IN THE

Supreme Court of the United States

DIANNE FOSTER, MARK ALBRECHT, RICHARD DIGIACOMO, and BARRY LEE PARKS,
Petitioners,

v.

LORRAINE GARCY, in her official capacity as Superintendent, Board of Education, Livermore Valley Joint School District; KIM LOGAN, Superintendent, Ukiah Unified School District; JOE COTO, Superintendent, East Side Union High School District; RUTH MCKENNA, in her official capacity as Superintendent, Board of Education, New Haven Unified School District,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STEPHEN P. BERZON *
JEFFREY B. DEMAIN
ALTSHULER, BERZON,
NUSSBAUM, RUBIN & DEMAIN
177 Post Street, Suite 300
San Francisco, California 94108
(415) 421-7151
Attorneys for Respondents

* Counsel of Record

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Court of Appeals properly held that a public employer incurs no liability under 42 U.S.C. § 1983 for failing to police the details of the union's annual agency fee notice issued pursuant to *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), unless the employer takes adverse action against the fee payers beyond making routine payroll deductions for agency fees.

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STATEMENT

We do not take issue with the facts stated in Petition's Statement of the Case (Pet. at 3-9), although we disagree with the characterizations and legal conclusions intertwined therein.

REASONS FOR DENYING THE WRIT

The Petition should be denied because it presents no important issue which requires the attention of this Court and,

moreover, identifies no square conflict between the circuits or between the Court of Appeals' decision and a decision of this Court:

First, the federal district courts retain the authority under the Court of Appeals' decision to issue temporary, preliminary and permanent injunctive relief to restrain the unlawful collection of agency fees, and such relief will be enforceable against public employers. Moreover, fee payers are better situated to assert and protect their own rights than are their employers. *See* Section I.

Second, the Court of Appeals' decision is not contrary to the state action doctrine and does not accord a blanket immunity to public employers from suit under 42 U.S.C. § 1983. Rather, it merely recognizes that the legal duties owed by a public employer to its fee-payer employees differ from those owed by the union that represents them. *See* Section II.

Third, the Court of Appeals decision is not in conflict with any of the decisions of the other circuits identified by Petitioners, nor is it in conflict with this Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), which did not address, much less resolve, the issue of the public employer's liability, *vel non*, for legal deficiencies in the union's *Hudson* notice. *See* Section III.

I. CONTRARY TO PETITIONERS' UNSUPPORTED ASSERTION, THE COURT OF APPEALS' DECISION WOULD NOT PRECLUDE A DISTRICT COURT FROM ISSUING AN INJUNCTION ENFORCEABLE AGAINST PUBLIC EMPLOYERS TO RESTRAIN AN UNLAWFUL AGENCY FEE COLLECTION

1. *Agency Fee Payers Can Still Obtain Injunctive Relief Against Unlawful Fee Seizures Under the Court of Appeals' Decision.* Petitioners' fundamental argument is that, under the Court of Appeals' decision, the federal courts will be powerless to halt the collection of agency fees where the union's *Hudson* notice does not comply with the requirements this Court set forth in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). As we show below, however, that argument is meritless.

Petitioners assert, without citing any supporting authority, that unless the courts impose upon public employers a legal duty to police the union's *Hudson* notice, "a court cannot enjoin the employers from taking employees' money and paying it to the unions; even where, as here, the court has found the unions are not lawfully entitled to the fees." Pet. at 3. Petitioners later continue that, because "[m]any states with public-sector agency shop permit involuntary withholding from payroll to enforce compliance with union subsidy obligations," the "panel's decision has the practical effect of extinguishing the First Amendment rights of large numbers of nonunion public-sector employees." Pet. at 22.

The well-established law, however, clearly provides to the contrary that the federal courts have ample authority to enjoin an unlawful agency fee collection even though (as the Court of Appeals decided) public employers have no legal duty to police the union's compliance with the details of *Hudson*'s requirements, absent some adverse action going beyond a mere payroll deduction. First, as Petitioners admitted in the

Court of Appeals, the presence of the public employer as a defendant in Section 1983 suits over allegedly deficient *Hudson* notices is not necessary for suit to be brought against the union. *See* Plaintiffs'/Appellees' Opposition Brief (hereinafter "Pls' Opp. Brf."), filed in the Ninth Circuit on or about May 10, 2000, at 23-24.[1]

Second, Federal Rule of Civil Procedure 65(d) clearly confers authority to the federal district courts to restrain an unlawful fee collection, through temporary, preliminary and permanent injunctive relief, regardless of the presence *vel non* of the public employer as a defendant to the action. Rule 65(d) states, in its entirety, as follows:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, *and upon those persons in active concert or participation with them* who receive actual notice of the order by personal service or otherwise.

Fed. R. Civ. P. 65(d) (emphasis added).

Rule 65(d) gives the federal district courts clear authority to issue temporary, preliminary and/or permanent injunctive

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[1] Petitioners' admission is supported by clear law. Where a private party acts "under color of" state law, it can be sued under 42 U.S.C. § 1983 without the presence of a public entity or employee as a defendant. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Here, there is no question that the "under color of" state law requirement of Section 1983 is satisfied by the state statutes permitting school districts to enter into and enforce agency fee agreements, the agency fee agreements between the school districts and the unions in this case, and the actual withholding of the fees from the plaintiffs' paychecks. *See, e.g., id.*, 457 U.S. at 941-42.

relief against a union to restrain the collection of agency fees pursuant to a legally deficient *Hudson* notice. Such relief would also bind the non-party public employer which deducts the fees from the employees' paychecks, as long as it receives actual notice of the order, because the employer undoubtedly acts in "concert or participation" (Fed. R. Civ. P. 65(d)) with the union in deducting agency fees pursuant to an agency fee agreement. Thus, contrary to the Petition, the federal courts retain plenary power under the Court of Appeals' decision to restrain unlawful agency fee collections.[2]

Since the district courts can enjoin unlawful fee collections under the Court of Appeals' decision, Petitioners' request for *certiorari* can have no practical effect in this case. As Petitioners note, the district court did not grant nominal damages against the public employers here (Pet. at 8 n.7), a ruling that Petitioners did not appeal. As they also admit, Petitioners dropped their claim against the public employers for monetary relief, pursuant to the Eleventh Amendment. *Id.* Finally, review by this Court can have no practical effect even on an award of attorneys' fees to Petitioners. The defendants are signatory to an agency fee indemnification agreement whereby the unions promise to indemnify the public employers against agency fee litigation (including attorneys' fees), and thus even a fee award would ultimately be borne solely by the union defendants.[3]

2. *Petitioners' Argument that Public Employers Are Better Situated to Protect Fee Payers' Rights Than Are the Fee Payers Themselves Is Erroneous and, in Any Event, Does Not*

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[2] Petitioners complain, "At no time prior to the district court's ruling did the school districts discontinue the collection of agency fees from the teachers' wages." Pet. at 5. While that is true, Petitioners have no one to blame but themselves, as they failed even to seek a temporary restraining order or a preliminary injunction to halt the fee collection.

[3] Petitioners asserted no challenge to the indemnification agreement in this action.

Present an Issue Worthy of Certiorari. To the extent that Petitioners are seeking to argue that agency fee payers' rights will be infringed under the Court of Appeals' decision, notwithstanding the continued availability of injunctive relief against unlawful fee collection, because they will have to go to court to obtain such relief (*see* Petition at 22-25), that argument is no more persuasive.

In essence, Petitioners' argument is that public employers are better situated than are their agency fee payer employees to protect the fee payers' *Hudson* rights, so that public policy favors imposing on the employer a duty to evaluate the union's compliance with the details of *Hudson*'s requirements and to cease deducting the agency fee if the employer determines such compliance to be inadequate. This argument is based upon a false premise. Petitioners apparently contemplate the alternatives as litigation brought by the fee payers, on the one hand, versus a cost-free refusal of the public employer to continue collecting agency fees until the union complies in all respects with the details of *Hudson*, on the other hand. But a public employer's refusal to collect agency fees would invariably result in the union bringing a breach of contract claim against the employer to enforce the agency fee agreement, as to which each party would bear its own costs and fees *regardless of which side prevails.*[4] The fee payers, on the other hand, can recover their costs and fees under 42 U.S.C. § 1988, if they prevail.

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[4] Indeed, it is likely that such a claim would be subject to arbitration under the collective bargaining agreement, in which the union would prevail because arbitrators commonly refuse to look to external law but instead enforce the parties' agreement. *See, e.g, Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 10-11, 10 Cal. Rptr. 2d 183, 832 P.2d 899 (1992) (arbitrators need not apply external law). The union could then enforce the arbitration award in state court, since California does not permit its courts to refuse to enforce an arbitration award even where the arbitrator has committed patent legal error. *See id.*, 3 Cal. 4th at 33.

Thus, only where the fee payers act on their own behalf will the cost of vindicating their rights be borne by the union. Fee payers are therefore in a better position to safeguard their rights than is the public employer, since the threat of having to reimburse the fee payers for their attorneys' fees provides a strong incentive for the union to fulfill its *Hudson* obligations. Petitioners' effort to drag the public employer into their dispute with the union, and to saddle it with a Hobson's choice of either being sued by the fee payers if it continues to deduct agency fees or being sued by the union if it refuses to do so, is not supported by law, logic or public policy.

The public employer is also particularly ill-suited to intervene in the dispute between the union and its agency fee payers regarding the union's *Hudson* notice because well-established public policy prohibits it from interfering in the internal affairs of the union and the employees whom the union represents. *See* California Government Code § 3543.5(d) (prohibiting California public school districts from interfering in the administration of the unions representing their employees).

Consistent with this statutory mandate, the California Public Employment Relations Board ("PERB")—the state agency charged with interpreting and enforcing public employment bargaining laws including Government Code § 3543.5(d)[5]—has promulgated regulations specifying that the union, not the public employer, is responsible for informing the employees of the amount and basis for calculating the agency fee, as well as of the procedure for challenging it. 8 California Code of Regulations § 32992. Moreover, PERB has also specifically held that imposing

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[5] *See* California Government Code §§ 3541 (establishing PERB); 3541.3(g) (authorizing PERB "to adopt . . . rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter").

such a duty on the employer would conflict with the statutory prohibition on interference with the union's affairs. *San Ramon Valley Unified School District (Abbot)*, PERB Decision No. 751, 13 P.E.R.C. ¶ 20201 at p. 732 (1989); *accord Sweetwater Union High School District (Gerber)*, PERB Decision No. 1417, 25 P.E.R.C. ¶ 32024 (2001).

As PERB held in *Abbot*, the position espoused by Petitioners here "is incompatible with the entire notion of collective bargaining," because "[t]he 'arm's length' relationship required by collective bargaining recognizes that the employer and the union have conflicting interests" which "obviously render unworkable any scheme where the employer must police the union's actions, lest it be held liable for them." *Abbot*, 13 P.E.R.C. ¶ 20201 at p. 732. Moreover, as PERB also recognized, there are "practical reasons why creating such a duty [as to the employer] makes little sense," such as the fact that "[a] public school employer simply does not have the authority or resources to review union procedures and determine if they are statutorily or constitutionally adequate." *Id.*

The reasoning of *Abbot* is compelling. The public employer's role in the agency fee context is limited to deducting the fees and transmitting them to the unions; the employers retain no more control over the fees than they do over payroll deductions that they may make for the United Way or for other charitable organizations. The unions act alone and in their own interest in determining both the purposes for which agency fees shall be spent and the form and content of their *Hudson* notices. Moreover, public employers lack the information and expertise to look over the unions' shoulders and review the legality of their agency fee procedures. The Court of Appeals' decision is thus eminently reasonable, not only as a matter of law, but as a matter of public policy as well.

Finally, the authorities on which Petitioners' rely for their argument (*see* Petition at 23-25) are inapposite, as they concerned claims by fee payers that the indemnification provisions of agency fee agreements, whereby the unions promise to indemnify the public employers in the event of litigation over the withholding of agency fees, should be declared void as against public policy. In the present case, however, the courts below rendered no decision as to any indemnification provision for the simple reason that Petitioners brought no such challenge in this case. *See* Pet. App. A, B, C, D; Pls' Opp. Brf. at 41-42. There is thus no conflict between the Court of Appeals' decision and those relied on by Petitioners concerning the propriety of such indemnification provisions. Indeed, the Ninth Circuit has not yet ruled on that issue,[6] and thus there is no square conflict between the indemnification decisions relied upon by Petitioners and *any* decision of the Ninth Circuit.

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[6] In *Prescott v. County of El Dorado*, 177 F.3d 1102, 1111-12 (9th Cir. 1999), the Ninth Circuit rejected a challenge by agency fee payers to an agency fee indemnification provision, based upon lack of standing. This Court reversed and remanded that decision for reconsideration in light of its then-recent decision in *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). *See Prescott v. County of El Dorado*, 528 U.S. 1111 (2000). On remand, the Ninth Circuit in turn remanded the issue for reconsideration by the district court in the first instance, reinstating the remainder of its decision. *Prescott v. County of El Dorado*, 204 F.3d 984 (9th Cir. 2000). On remand, the district court adhered to its prior ruling that the fee payers lacked standing, after reconsideration of the issue under *Laidlaw*. Plaintiffs' appeal from that decision is currently under submission to the Ninth Circuit, which heard oral argument on April 9, 2002. *See* http://www.ca9.uscourts.gov/ca9/calendar.nsf/a970-d6cd327cd7d1882564030063ce23/d3e08e46302910ca88256b8f00631765/$FILE/sf04_02.PDF

II. THE COURT OF APPEALS' DECISION IS NOT CONTRARY TO THE STATE ACTION DOCTRINE

Petitioners argue that the Court of Appeals' decision is contrary to the state action doctrine. *See* Pet. at 18-22. The crux of Petitioners' argument is their assertion that "[b]ecause the unions, unlike the school districts, are non-governmental actors, there is no intellectually tenable way to hold the unions, but not the school districts, liable for a constitutional violation arising out of joint participation in the enforcement of an agency fee agreement." Petition at 18. This assertion is incorrect.

To be sure, we do not dispute that the otherwise private labor organizations which receive agency fees pursuant to the state agency fee statutes are thereby suable under 42 U.S.C. § 1983 for violations of their *Hudson* obligations.[7] Likewise, Petitioners do not dispute that the public employer need not be named in such an action in order to sue the union. *See* Pls' Opp. Brf. at 23-24; *accord Lugar*, 457 U.S. at 941-42.

Petitioners' conclusion that "there is no intellectually tenable way to hold the unions, but not the school districts, liable for a constitutional violation arising out of joint participation in the enforcement of an agency fee agreement" (Petition at 18) does not follow from this premise, however. The public employer and the union are "joint[ly] participat[ing]" only in the sense that they are both operating under the agency fee agreement between them; in fulfilling its duties with regard to the notice, however, the union acts separately and independently of the employer. As the Court

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[7] *See* discussion, *supra*, at Section I(1), n.1. At the time the agency fee agreements at issue in this case were negotiated, California law permitted public school districts to negotiate such agreements with the unions that represent their employees. On January 1, 2001, that statute was amended to *require* the school districts to adopt agency fee arrangements upon the request of the union. *See* Cal. Gov't Code § 3546(a).

of Appeals held, each has separate and distinct legal duties and the violation by the union of its legal duty does not render the public employer vicariously liable therefor. There is nothing "intellectually [un]tenable" about such a division of duties, which corresponds to the aspects of the agency fee system that each controls.

Nor does the Court of Appeals' decision grant any "blanket immunity for public employers that enforce illegal agency fee demands." Pet. at 17. To the contrary, public employers remain liable to suit if they violate the legal duties *they* owe to fee payers. Thus, under both the Court of Appeals' decision (*see* Pet. App. A at 6a-9a & n.8) and the Ninth Circuit's prior decision in *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 817 (9th Cir. 1997), the public employer can incur liability if it takes affirmative action against a public employee, e.g., discipline or discharge, going beyond the mere routine deduction of fees, without making sure that the union fulfilled its notice obligations under *Hudson*.[8] For that reason, *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988), a decision relied on by Petitioners notwithstanding that it has nothing to do with agency fees (*see* Pet. at 21-22 n.15), is of no help to them since the public employer in that case in fact terminated the plaintiff's employment at the behest of a private entity.[9]

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[8] Plaintiffs are incorrect that because California law permits payment of agency fees by a nonconsensual payroll deduction, California unions will never need to seek disciplinary action against fee payers to enforce their agency fee obligation. *See* Pet. at 17. Since California Education Code § 45061 gives fee payers the option to pay agency fees directly to the union, rather than through a payroll deduction, a California union may need to request a public employer to take disciplinary action against a fee payer who elects to pay agency fees directly but then fails to do so.

[9] Moreover, none of the authorities relied upon by Petitioners for their "state action" argument (*see* Pet. at 18-22) are circuit court decisions, so Petitioners have failed to identify a circuit conflict on this issue.

III. THERE IS NO SQUARE CONFLICT BETWEEN THE CIRCUITS, OR BETWEEN THE COURT OF APPEALS' DECISION AND THIS COURT'S DECISION IN *HUDSON*

Petitioners also have failed to identify a square conflict between the circuits or between the Court of Appeals' decision and a decision of this Court.

1. Despite Petitioners' assertion, there is no conflict between the Court of Appeals' decision and prior decisions of the Sixth, Seventh and Third Circuits. Pet. at 10-14.

First, although Petitioners cite the Sixth Circuit's decision in *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), they concede that the Court of Appeals' decision "interpreted *Tierney* not to impose employer liability where the union put in place a *plan* comporting with *Hudson* but a nonunion employee nonetheless did not receive adequate notice . . . ." Pet. at 11 (emphasis in original).

Petitioners challenge the Court of Appeals' reading of *Tierney* on the ground that "*Tierney* requires not only that constitutionally adequate procedures be established, but also that these procedures be 'operating.'" Pet. at 11 (quoting *Tierney*, 824 F.2d at 1504, 1507). That observation does not a conflict make, however. As the Court of Appeals' decision reflects, "a plan comporting with *Hudson*" (Pet. App. at 8a, emphasis deleted) was not only in place but also operating when the fees were deducted. The dispute in this case was not that there was no "plan" in place and operating that generally complied with *Hudson*, but rather about whether the details of the plan or of the union's implementation of the plan complied with *Hudson* in every regard.

Second, there is no conflict with the Sixth Circuit's decision in *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992). *See* Pet. at 12. *Weaver* involved, in relevant part, a challenge brought by agency fee payers to

indemnification provisions of the agency fee agreements, pursuant to which the unions pledged to indemnify the public employers against liability in agency fee litigation. As noted above, the Court of Appeals' decision does not decide or even address any challenge to an agency fee indemnification clause for the simple reason that no such challenge was brought in this case, and indeed the propriety of indemnification provisions (and, for that matter, agency fee payers' standing to challenge them) is an open question in the Ninth Circuit. *See* discussion, *supra*, at Section I(2) and n.6.[10]

Third, there is no conflict with the Seventh Circuit's decision in *Hudson v. Teachers Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986). *See* Pet. at 12-13. Petitioners quote that decision as follows: "[T]he public employer must establish a procedure that will make reasonably sure that the wages of nonunion employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining." Pet. at 12-13 (quoting *Hudson*, 743 F.2d at 1194). As we have already pointed out above with regard to *Tierney*, there is no conflict here because the Court of Appeals' decision reflects that "a plan comporting with *Hudson*" (Pet. App. at 8a, emphasis deleted) was in place and operating when the fees were deducted. To the contrary, the Seventh Circuit's statement that the public employer merely must "make *reasonably* sure" that the agency fees will not be used to subsidize ideological activities that are not germane to collective bargaining (*Hudson*, 743 F.2d at 1194 (emphasis

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[10] For the same reason, there is no conflict with *Cramer v. Matish*, Nos. 89-1885/2077, 1990 WL 169640 (6th Cir. 1990), *see* Pet. at 12, which in any event is an unpublished and therefore non-precedential decision. *Cf.* Sixth Circuit Rule 206(c) (published decisions are binding on subsequent panels).

added)), only underscores that it is not obligated to insure that the *details* of the union's plan or of the union's implementation of the plan are perfect.[11]

Fourth, there is no conflict with the Third Circuit's decision in *Hohe v. Casey*, 956 F.2d 399 (3rd Cir. 1992). Pet. at 13-14. Petitioners quote *Hohe* to the effect that the public employer "may be enjoined from imposing the fair share fees on nonmembers when it is determined that the exclusive representative has not complied with the constitutional requirements." Pet. at 14 (quoting *Hohe*, 956 F.2d at 411). The same is true under the Court of Appeals' decision. As we have shown above, where it is determined that the union has not complied with *Hudson*, it can be enjoined from accepting agency fees until it has complied with *Hudson* and, under Federal Rule of Civil Procedure 65(d), that injunction will be binding upon a public employer which receives actual notice thereof. *Hohe* did not decide whether the public employer must necessarily be a defendant to such a suit (which, in any event, it need not, *see Lugar*, 457 U.S. at 941-42), since the relevant discussion in *Hohe* arose in the context of the fee payers' challenge to the agency fee indemnification clause, rather than a motion for dismissal or summary judgment by the public employer. *See Hohe*, 956 F.2d at 411.[12]

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[11] Petitioners also cite the Seventh Circuit's discussion of the state action issue in *Hudson*. Pet. at 13. As they concede, however, that issue in *Hudson* revolved around whether the *union* could be considered a state actor—an issue not raised in the present case. *Id.* The statement in the Seventh Circuit's decision that "when a private entity such as a union acts in concert with a public agency to deprive people of the federal constitutional rights, it is liable under section 1983 *along with the agency*" (*id.*, emphasis in original; quoting *Hudson*, 743 F.2d at 1191), must be understood in the larger context of the case itself, in which the court found the *plan* itself to be invalid and not merely the details of the union's implementation of the plan.

[12] Petitioners also quote *Hohe* to the effect that "the employer and the union must have a constitutional procedure in place *before* deducting

Additionally, it is worth noting that *all* of the circuit court decisions relied upon by Petitioners were rendered not only prior to the Court of Appeals' decision, but also prior to the Ninth Circuit's 1997 decision in *Knight*, on which the more recent decision is based. *Knight* criticized the reasoning of several prior decisions, including *Tierney*, for misreading *Hudson* as imposing certain duties on the public employer which *Hudson* did not. *See Knight*, 131 F.3d at 817. This does not amount to a square conflict between the circuits, for the reasons discussed above. But, to the extent that there is some tension between the reasoning of *Knight* and that of some of the decisions relied upon by Petitioners, it is worth noting that Petitioners have not cited a single decision rendered after *Knight*, much less one considering and rejecting *Knight*'s reasoning. We submit that any tension between these decisions (much less any asserted "conflict") should not be the basis for intervention by this Court until such time (if ever) that it is more fully developed by subsequent circuit decisions that have had an opportunity to address *Knight*.

2. Finally, there is no conflict with this Court's decision in *Hudson*, which does not speak, expressly or impliedly, to the potential liability of a public employer for legal deficiencies in the union's annual agency fee notice.

In *Hudson*, this Court affirmed in part the Seventh Circuit's reversal of the district court's judgment, rendered after a bench trial, for the defendants upholding the agency fee

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[agency] fees," and that this requirement "means that if a court subsequently determines that the procedures are constitutionally inadequate, both the public employer and the [union] shall be accountable for the constitutional violation." Pet. at 14 (first substitution added, second substitution in original; quoting *Hohe*, 956 F.2d at 405-06, emphasis in original). Again, there is no conflict with the Court of Appeals' decision since such a plan was clearly in place at all relevant times, and the dispute was instead over the details of that plan or of the union's implementation of the plan.

procedure. *See Hudson*, 475 U.S. at 298-301; *Hudson*, 743 F.2d at 1190. This Court did not affirm any judgment of liability against the public employer, since there was no such judgment below. Rather, the Seventh Circuit, whose decision this Court affirmed in part, had reversed the judgment of the district court and remanded the case for further proceedings consistent with its opinion. *Hudson*, 743 F.2d at 1197.

Further, there is no indication in this Court's opinion that the public employer ever raised the issue before this Court that is implicated here—whether a public employer can incur liability for the deficiencies in the union's annual fee notice merely by the routine deduction of agency fees. Nor does the Court's opinion in *Hudson* decide that issue, either explicitly or implicitly. To be sure, as Petitioners point out, the Court did recite that the public employer accepted the union's calculation of the fair share fee, made the requested fee deductions, and did not provide fee payers with an explanation of the union's calculation or the agency fee procedures. *See* Pet. at 15 (quoting *Hudson*, 475 U.S. at 296). But the Court's observations on this point were merely set forth in its statement of the underlying facts of the case. The Court nowhere alluded to (much less relied on) these facts in its discussion, nor did it draw any conclusions from them.

In fact, there is virtually nothing in the Court's discussion that bears on the liability of the public employer at all, much less in the context within which that issue is raised here—the union's annual fee notice. The *Hudson* Court's discussion of government responsibility arose in the context of its separate discussion of the requirement of a reasonably prompt decision by an impartial decisionmaker as to challenges to the union's calculation of the agency fee (i.e., the agency fee arbitration), rather than in its discussion of the union's annual fee notice. *See Hudson*, 475 U.S. 307 & n.20. And, even as to its discussion of the agency fee arbitration, the *Hudson* court did not impose any liability upon the public employer. Rather,

the Court made clear that the *union* has the responsibility to provide such an expedited procedure, *if* the government *qua* government (not *qua* employer) *chooses* not to do so. *Id.* at n.20.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN P. BERZON *
JEFFREY B. DEMAIN
ALTSHULER, BERZON,
NUSSBAUM, RUBIN & DEMAIN
177 Post Street, Suite 300
San Francisco, California 94108
(415) 421-7151
Attorneys for Respondents

* Counsel of Record

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